James C. Smith
Senior Vice President

SBC Telecommunications, Inc.
1401 Eye Street, NW,
Suite 1100
Washington, D.C. 20005
Phone: 202-326-8836
Fax: 202-289-3699
James.C.Smith@sbc.com

February 3, 2005

Michael K. Powell, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266.

Dear Chairman Powell:

As you know, SBC has strongly supported the Commission's efforts to reform the current intercarrier compensation regime in a fair and unified manner. In furtherance of those efforts, SBC has joined with other service providers -- including Level 3 -- to form an industry-leading coalition, known as the Intercarrier Compensation Forum (ICF), which has presented the Commission with a comprehensive plan for intercarrier compensation reform.[1] Such comprehensive reform is critical to ensure that affordable communications services are universally available to consumers across the nation, and to make certain that innovative new technologies and services succeed based on their ability to benefit consumers -- not their ability to gain an unfair regulatory advantage from the Commission's intercarrier compensation rules. Precisely because of this urgent need for *comprehensive* reform, the Commission should deny Level 3's petition for forbearance from access charges for IP-PSTN traffic.[2]

Through its petition, Level 3 seeks the Commission's blessing for the "heads I win, tails you lose" proposition that Level 3 and other CLECs have already unilaterally put into practice. In the case of VoIP-to-PSTN traffic, Level 3 has been able to avoid the lawful assessment of access charges by routing this traffic to the PSTN over local interconnection trunks rather than access trunks. But in the case of interexchange PSTN-to-VoIP traffic, Level 3 is able to collect

[1] *See* Letter from Richard Cameron, counsel for ICF, to Marlene Dortch, FCC, CC Docket No. 01-92 (Oct. 5, 2004) (transmitting ICF plan). As a large local telephone company, a major provider of long distance, a joint owner of a large wireless provider and a leading provider of Voice over Internet Protocol (VoIP) services, SBC brings a broad and balanced perspective to intercarrier compensation reform.

[2] Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266 (Dec. 23, 2003) (Level 3 Petition). We use the term "IP-PSTN" to refer collectively to traffic flowing from IP networks to the PSTN as well as traffic flowing from the PSTN to IP networks. When we refer to a specific traffic flow, we use the terms "VoIP-to-PSTN" or "PSTN-to-VoIP."

access charges from wireless providers and long distance providers. Level 3 is now asking the FCC to sanction this one-sided arrangement so Level 3 and similar carriers can officially eliminate their obligations to *pay* access charges for VoIP-to-PSTN calls, but maintain their ability to *receive* access charges for PSTN-to-VoIP calls.

The Commission should deny Level 3's petition and reaffirm that, under its long-standing rules, access charges apply to IP-PSTN traffic. The asymmetric compensation arrangements proposed by Level 3 create a subsidy flowing to Level 3 and other similar carriers, giving them an unjustified windfall. Moreover, Level 3 simply ignores the serious problems associated with properly identifying, routing and rating IP-PSTN traffic that would make its proposed scheme impossible to implement fairly, especially in the context of a forbearance petition. In particular, these implementation problems render Level 3's politically-motivated scheme to "carve-out" rural carriers from its forbearance request little more than an illusion -- *rural carriers will undoubtedly face substantial decreases in access charges if the Commission grants Level 3's petition*. Worst of all, Level 3's request for piecemeal regulatory change would severely destabilize and undermine universal service. For all of these reasons, which are explained more fully below and in the attached memorandum, the Commission should deny Level 3's petition.

1. Level 3's Petition Disrupts Efforts to Reform Intercarrier Compensation.

The 1996 Act opened up new avenues of competition and spurred the introduction of new technologies in the communications marketplace to the great benefit of American consumers and businesses. At the same time, this competition and technology placed new stresses on the Commission's existing intercarrier compensation regime and universal service support mechanisms. Thus, for nearly a decade since the passage of the 1996 Act, the Commission and the communications industry have been laboring to reform intercarrier compensation and universal service. In those reform efforts, the Commission has always proceeded holistically, with careful attention to three interrelated variables: intercarrier compensation, universal service, and end-user rates. At long last, the Commission is now reportedly poised to launch a comprehensive reform proceeding, based in significant part on the ICF plan, that would provide certainty and stability to the communications industry and its customers.

With its imprudent forbearance petition, Level 3 seeks to jump out ahead of the Commission on intercarrier compensation reform by obtaining a quick, self-serving fix on *one* intercarrier compensation issue without the slightest regard for how such piecemeal relief would complicate resolution of all the *other* issues to which this one issue is inextricably tied. Moreover, because Level 3 seeks such relief in isolation, the resulting scheme would create perverse incentives for access avoidance and threaten the universal availability of affordable telephone service. Accordingly, the Commission should deny Level 3's petition and turn its full attention to the holistic reform proposals that SBC and Level 3 are advocating in the ICF plan.

2. Level 3's Forbearance Request Would Result in an Arbitrary and Capricious Asymmetrical Intercarrier Compensation Regime for IP-PSTN Traffic that Would Drain Access Charges from the PSTN.

As explained above, the compensation regime that Level 3 seeks to perpetuate in its petition is blatantly asymmetrical and discriminatory. Level 3 proposes to eliminate access charges for VoIP-to-PSTN traffic. But it carefully attempts to avoid discussing traffic sent *from* the PSTN *to* a VoIP customer in a distant rate center or area code.[3] If Level 3 were successful, it and similar carriers would be relieved of their existing obligations to pay access charges, while continuing to receive access charges from wireless providers and long distance providers.

The absurd result of Level 3's petition would be that PSTN-based customers who purchase wireless or traditional long distance service would be forced to subsidize Level 3 and other CLECs that do business with VoIP providers. At the same time, Level 3's proposal to eliminate access charges for VoIP-to-PSTN traffic would drain away essential support for the PSTN. For these reasons, Level 3's petition is senseless as a policy matter and untenable as a legal matter. It clearly does not satisfy the Act's forbearance standards.

3. Level 3's Proposed Scheme is Rife with Serious Implementation Problems.

Level 3's petition is notably silent on pervasive problems regarding the identification, routing and rating of IP-PSTN traffic that make it virtually impossible to implement Level 3's proposed exemption from access charges. For VoIP-to-PSTN traffic, the CLEC serving the originating VoIP provider is the only party in a position to determine which traffic would be subject to the access charge exemption proposed by Level 3, and it may not even have that information. Moreover, Level 3 has failed to suggest a reliable, accepted means for identifying VoIP-to-PSTN traffic that would enable the "proper" routing and rating of that traffic under Level 3's proposed scheme. As a result, there will be no way to verify VoIP-to-PSTN traffic as distinct from other types of interexchange traffic that are subject to access charges, including PSTN-to-PSTN traffic and IP-in-the-middle traffic. This is a recipe for fraud and abuse on a scale never before seen by the Commission.

For similar reasons, the purported "rural carve-out" in Level 3's petition is nothing but an illusion -- rural carriers will *not* receive the access charges they are owed for VoIP-to-PSTN traffic under Level 3's proposal. Rural carriers typically do not have direct interconnection arrangements with CLECs like Level 3. Rather, they rely on indirect interconnection through non-rural ILECs. Thus, while Level 3 has proposed sending VoIP-to-PSTN traffic to non-rural ILECs over local interconnection trunks, its forbearance petition does not (indeed, legally cannot) propose any new rules that would create a reliable means for non-rural ILECs to identify that traffic and then re-route that traffic over access trunks to a rural ILEC. The end result is that rural ILECs will be stripped of their ability to collect access charges if Level 3's petition is granted.

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[3] Instead, Level 3 tries to divert the Commission's attention by including in its requested relief the almost trivial amount of PSTN-to-VoIP IntraLATA toll traffic that is already delivered over local interconnection trunks today. *See* Level 3 Petition at 6.

The problems implementing Level 3's proposal in the context of PSTN-to-VoIP traffic -- assuming Level 3 agreed to amend its petition to request a symmetrical compensation regime -- are even more pervasive. Level 3 *admits* that there is no way for an originating carrier of circuit-switched traffic (local telephone company, wireless provider, or long distance provider) to know whether a particular call is bound for a VoIP customer. Thus, PSTN-to-VoIP traffic would continue to be routed and rated in the same manner as it is today. The practical result would be that Level 3 and similar carriers would be able to continue to receive access charges for PSTN-to-VoIP traffic, while avoiding any obligations to pay access charges for VoIP-to-PSTN traffic.[4]

4. Level 3's Petition Would Destabilize the PSTN and Undermine Universal Service.

Level 3's petition poses a severe threat to the stability of the PSTN and the sufficiency and sustainability of universal service. As the Commission is well aware, access charges play a critical role in supporting the universal availability of affordable telephone service across the nation. By exempting IP-PSTN traffic from access charges as proposed by Level 3, the Commission would be cutting off this vital source of support for universal service. Indeed, those VoIP providers who are playing by the rules and paying access charges today would cease paying access charges in the future. Moreover, granting Level 3's petition would provide an artificial incentive for even more VoIP providers to enter the market, further reducing the access charge revenues available to support universal service.

Even if Level 3 were to amend its petition and the Commission were to symmetrically exempt IP-PSTN traffic from access charges, it would be abruptly eliminating access charges for IP-PSTN traffic without creating a new mechanism to replace the implicit universal service support contained in those charges -- particularly the support in intrastate access charges. The Commission has long recognized the interrelationship of access charges and universal service, which is why it has always avoided flash-cut access reductions of the type being proposed by Level 3. With access charges and universal service already under enormous pressure due to the rapid growth of VoIP and other services that are not making contributions to universal service, the Commission would be accelerating the destabilization that is already occurring.[5]

5. Level 3's Petition Would Give VoIP Services an Unfair Regulatory Advantage Over Competing Wireless and Long Distance Services.

Even aside from the flaws discussed above, the relief Level 3 requests here would give it and similar carriers an arbitrary regulatory advantage over wireless providers and traditional long distance providers. Wireless providers and long distance providers would continue to pay access charges for their use of the PSTN, while Level 3 and similar carriers would completely avoid

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[4] Even if Level 3 voluntarily agreed to "refund" any access charges it collected on PSTN-to-VoIP traffic, there is currently no Commission rule requiring such a refund -- and thus no guarantee -- that other providers would do the same.

[5] According to press reports, Level 3 has apparently submitted a study to the Commission that addresses the economic impacts of the relief that Level 3 requests. SBC will respond to that study once it becomes publicly available.

those access charges -- even though they use the same PSTN facilities for the same functions as wireless providers and long distance providers. Such an unjustified and unnecessary regulatory advantage would directly contravene the Commission's stated belief that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. . . . [T]he cost of the PSTN should be borne equitably among those that use it in similar ways."[6] Given the Commission's views on this issue and the ongoing efforts toward comprehensive intercarrier compensation reform, there is simply no reason to bestow VoIP providers with an unfair arbitrage opportunity at the expense of their wireless and long distance competitors.

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Individually and in concert, these flaws further illustrate what sound policy considerations already make clear: the Commission should deny Level 3's petition. Instead, the Commission should declare that the access charge regime applies to IP-PSTN services under its long-standing rules,[7] and should swiftly launch its planned rulemaking on intercarrier compensation reform. The Commission should then turn its full attention to expeditiously completing the intercarrier compensation rulemaking by adopting the ICF's comprehensive proposal for intercarrier compensation reform.

After many years of tremendous effort, the Commission is finally on the path toward a unified intercarrier compensation regime that will bring enormous benefits to the entire communications industry and its customers. SBC strongly urges the Commission to stay the course and to complete the important task that Congress, the industry, and the Commission itself have worked so hard to achieve.

Sincerely,

/s/

James C. Smith

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[6] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4904 ¶ 61 (2004).

[7] *See* Opposition of SBC Communications, Inc., *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266, at 6-9 (March 1, 2004) (SBC Opposition); Reply Comments of SBC Communications, Inc., *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, WC Docket No. 03-266 (March 31, 2004) (SBC Reply Comments). *See also* Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36 (May 28, 2004); Reply Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36 (July 14, 2004).

Cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Dan Gonzalez
Scott Bergmann
Jeffrey Carlisle
Tamara Preiss